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Supreme Court, U.S.
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No. (1)

In the Supreme Court of the United States

GREGORY D. BOLIN,

Petitioner,

v.

E.K. MCDANIEL, WARDEN OF ELY STATE PRISON

THE STATE OF NEVADA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Nevada

PETITION FOR WRIT OF CERTIORARI

MICHAEL R. DOYEN*
PAUL J. WATFORD
MELINDA E. LEMOINE
LEE S. TAYLOR
JULIE D. CANTOR
Munger, Tolles & Olson LLP
355 South Grand Avenue
Suite 3500
Los Angeles, CA 90071
(213) 683-9100

Counsel for Petitioner

* Counsel of Record

CAPITAL CASE

QUESTION PRESENTED

The question presented in this case is:

Whether in a circumstantial murder case, an erroneous instruction permitting the jury to consider a prior unrelated offense as evidence of "propensity" can be harmless or whether, instead, such an error "vitiates *all* of the jury's findings." *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Gregory Bolin respectfully petitions for a writ of certiorari to review the judgment of the Nevada Supreme Court in this case.

OPINIONS BELOW

The Clark County District Court's denial of Mr. Bolin's state court petition for postconviction relief below is unpublished. A copy is reproduced in the Appendix. The Nevada Supreme Court's decision affirming the district court is also unpublished. A copy is reproduced in the Appendix.

JURISDICTION

Mr. Bolin invokes the jurisdiction of this Court under 28 U.S.C. § 1257. The judgment of the Nevada Supreme Court sought to be reviewed was entered on June 22, 2007. On September 11, 2007, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including November 19, 2007.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his

favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(d)(1) provides:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;

STATEMENT OF THE CASE

In this capital murder case, the jury was presented with detailed and graphic testimony from the victim of a wholly unrelated sexual assault to which the defendant had pled guilty twenty years earlier. The prosecution urged, and the trial court invited, the jury to consider this evidence to determine whether the defendant had an "emotional propensity for sexual aberration" that might bear on the current charge—for murder, in a case where the evidence of sexual assault was minimal at best.

In subsequent cases, the Nevada Supreme Court held that the trial court's instruction in Mr. Bolin's case was erroneous. The Court first explained that using prior offenses to show "propensity" was forbidden because it not only permits, but invites the jury to convict because it "believes the defendant to be a bad person." *Braunstein v. State*, 40 P.3d 413, 417 (Nev. 2002). The Court then overruled its prior approval of the instruction at issue. *Richmond v. State*, 59 P.3d 1249, 1256 (Nev. 2002)

The trial court's invitation to the jury to consider the prior bad act evidence as establishing a "propensity" to commit such offenses—and thus to view every inference in this entirely circumstantial case through that lens—rendered the trial fundamentally unfair in violation of the Due Process Clause. That fundamental unfairness was not and could not be deemed "harmless." Any such after-the-fact assessment of the evidence substitutes unbridled speculation for a jury verdict beyond reasonable doubt.

A. The Circumstantial Case Against Mr. Bolin

The State's case against Mr. Bolin was entirely circumstantial. The victim, Brooklyn Ricks, was found stabbed to death at a construction site. She was found fully clothed; the evidence that the murder was part of a sexual assault was that her underwear was on inside out. Record on Appeal ("ROA") 29:60. There were no cuts or bruises characteristic of sexual assault. There were no eyewitnesses to the crime. There was no fingerprint evidence linking Mr. Bolin to the scene, no blood evidence, no semen. The prosecution built its case around the undisputed facts that Mr. Bolin's mother had an account at the video store where the victim worked and that Mr. Bolin had visited the store on the night she died.

The construction worker who found Ms. Ricks body told police that he had briefly seen an African-American man walking away from the construction site where he found the body. ROA 22:36-37, 40-46. When first interviewed by investigators, the witness stated that, from inside his truck and at a distance of at least 20 feet, he had seen the man only from the right side and did not directly observe the man's face. ROA 6:26, 31; 23:28-31.

The following day, the witness was asked to come to the station and was told that, because he was the only person who had seen the suspect at the crime scene, the "awesome responsibility" for identifying the suspect "solely rests with you." ROA 25:12-13, 24:30. At the station, even after a highly suggestive one-on-one "show up" procedure,[1] the witness was

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[1] The police positioned the witness where he could see Mr. Bolin being escorted through to the "booking area" by a uniformed police officer. ROA 22:65; 26:95. Then, in the witness's line of

unable to identify Mr. Bolin as the man he had seen. The witness stated that, on a scale of 1 to 10, he would gauge the likelihood that Mr. Bolin was the person he had seen at the construction site as a "5." ROA 27:29; 40:21.

An hour later, the witness called the police, seeking assurance that Mr. Bolin was the person *the police believed* the witness had seen leaving the crime scene. ROA 22:71; 40:26. After this conversation, the witness stated that he was 70-80% sure that Mr. Bolin was the man he had seen the day before, from the side, from inside his car, at a distance of twenty feet. ROA 24:46; 27:137. That testimony reached its final evolution at trial, when the witness claimed, for the first time, that he could identify the defendant because "I recognize his face." ROA 25:47

The State also relied on two pubic hairs found on the victim. One hair was sent for DNA testing.[2] The State's own expert conceded that the results showed that, at some unknown point, the hair sample had been contaminated.[3] Because of that contamination,

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vision, Mr. Bolin was questioned by the same detective who had interviewed the witness at the scene, ROA 26:95-96, then photographed by the police photographer—who had also been at the scene, ROA 1:144; 6:117; 6:69; 24:43—and asked to disrobe, ROA 24:42; 25:60. Only then was the witness asked whether Mr. Bolin was the man he had seen.

[2] Although at least two potentially foreign hairs were found on the victim's body, one of which the State conceded was not Mr. Bolin's, the State's expert analyzed only the one, darker hair. ROA 31:169. This second pubic hair found on the victim was also circumstantial evidence of sexual contact and of a potential perpetrator *other than Mr. Bolin*, yet it was not subjected to any testing or analysis.

[3] The State's DNA expert testified that DNA material should be

the expert conceded that "no conclusion can be made regarding the donor of the hair"—i.e., there was no way to know whether the DNA came from the donor of the hair or from some other source before or after the crime. The DNA *might* have come from the perpetrator, some other person the victim was in contact with, or some other source during the investigation. In her testimony, the State's expert confirmed that she had "no way of knowing" whether the DNA came from the hair itself or from some other tissue attached to and contaminating the hair. ROA 31:179. The DNA analysis itself was not capable of *matching* DNA samples; the analysis merely narrowed the potential sources of DNA to several thousand people living in Las Vegas and an unknown number of visitors to the area.

With no basis for suggesting that the DNA came from the hair, the State nevertheless argued that a curly black pubic hair was probably "African-American," that the DNA came from this "African American" public hair, and that only 1 in 2600 African-Americans shared a particular genetic marker found in the DNA which was found on the (concededly contaminated) hair sample. ROA 31:212; *see also* ROA 49:33-34. The state's inability to determine whether the DNA came from the hair did not stop the prosecutor, who extrapolated that, based on the DNA and the African-American population of Las Vegas, only ten people in the city, one of whom was Mr. Bolin, could have committed the crime.[4]

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found only in the root of a hair, not the shaft, and that if tests extract DNA on the shaft of the hair, that means the hair sample has been contaminated. The hair found on the victim's body showed DNA on the shaft of the hair. ROA 31:179.

[4] Because each of the assumptions behind this statistical

Weak at best, the State's statistical evidence was entirely spurious, piling inference upon inference based on DNA evidence from which, as the State's expert's concluded, no inference could be drawn.

The State sought to buttress its weak circumstantial case with detailed and graphic evidence of a sexual assault more than twenty years earlier. Mr. Bolin had pleaded guilty in 1975 to kidnapping and sexual assault in Colorado. ROA 3:688. At trial in 1996, the State called the victims in the 1975 case, as well as the investigating officers, all of whom testified at length over the course of several days, setting out in graphic and riveting terms the unrelated details of a kidnapping and rape the defendant and an accomplice had committed twenty years earlier. ROA 27:69-86; 28:54-118; ROA 29:28-46; 29:5-27.

During the trial, the court repeatedly told the jury that it could consider this prior offense to assess whether Mr. Bolin had a "propensity" for "sexual aberration." ROA 27:86-87; 28:117-18. In its closing argument, the State emphasized this point, telling the jury that it could consider Mr. Bolin's "sexual aberrant behavior" in 1975 as bearing on the "sexual aberrant behavior seen in this case." ROA 51:168. The jury had seen no sexually aberrant behavior in the Nevada case, because no such behavior had been witnessed. The only thing the jury could make of this was that it was an entitlement to conclude that a defendant who once raped a woman at gun point was

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argument was unsustainable, the statistics, in fact, proved nothing. But even applying the State's flawed presumptions, there were at least 137 people in the City of Las Vegas (not even considering the large transient population) with the same genetic marker found in the DNA from the contaminated hair.

more likely to have committed a wholly unrelated stabbing (and possible sexual assault).

In its final instructions to the jury, the Court again told the jury that the evidence of the prior offense could be considered to show whether Mr. Bolin had an "emotional propensity for sexual aberration." ROA 51:94.[5] The court rejected Mr. Bolin's proposed instruction that would have limited the jury's consideration of the evidence to one of the recognized, non-propensity purposes typically allowed for evidence of other bad acts.[6]

The jury convicted Mr. Bolin on all counts. Mr. Bolin was sentenced to death.

On direct appeal, the State argued that the earlier offense was admissible to establish "identity." But Mr. Bolin's previous offense, committed in 1975, and the murder of Brooklyn Ricks, committed in 1995, revealed no signature or identity beyond the most abstract similarities: The victims were white, young women of average height and weight. (The Court also stated, incorrectly, that the victims were both blond. In fact, the victim of the 1975 offense testified

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[5] The jury instruction was as follows: "Evidence of a person's character or a trait of his character or evidence of other crimes, wrongs or acts, is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion. However, such evidence is admissible for other purposes, such as proof of motive, intent, knowledge, or identity, and as *evidence that the person possesses a specific emotional propensity for sexual aberration*."

[6] Mr. Bolin's proposed instruction was as follows: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may be admissible for other purposes such as proof of motive, intent, plan, or identity."

that she was a brunette. ROA 8:8.)[7] Justice Rose noted the absence of significant similarities that might establish a signature or fingerprint:

> And in this case I don't see much of that fingerprint. I see there was no murder [in Colorado], it was done with another [co-assailant], this is the Colorado matter. There was robbery [in the Colorado matter], robbery was clearly one of the major ingredients there and it appears to be marginal here. It was done with a gun in Colorado and a knife here. There were two victims in Colorado and not here. And the sexual assault [in the Nevada case] is questionable. So I don't see an awful lot of the identifying marks you're talking about and if I don't see a lot, I really wonder whether or not the District Court was right.[8]

The Court nevertheless affirmed, *Bolin v. State*, 960 P.2d 784 (Nev. 1998), holding that the twenty-

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[7] *Bolin v. State*, 960 P.2d 784, 796 (Nev. 1998) ("[the Colorado victim] was a twenty-year-old slender white female with blond hair who was 5'5" tall. Similarly, at the time of her abduction and murder, Ricks was a twenty-one-year-old slender white female with blond hair who was 5'7" tall."). The State argued that the prior act showed "identity" not based on any distinct *modus operandum* or "signature" linking the two offenses, but on the theory the same "kind of person" committed each offense; that is, "identity" is established by showing that the perpetrator in both cases had the same *propensity*.

[8] *See also Weber v. State*, 119 P.3d 107, 131 (2005) (Rose, J., concurring)(citing Mr. Bolin's direct appeal for the proposition that district courts admit prior bad act evidence too often, even if the act is remote in time).

year-old offense was properly admitted to prove identity. *Id.* at 796 n.5. As to the instruction to the jury that it could consider the evidence for the purposes of establishing a "propensity" for sexual aberration, the Court affirmed the instruction as an "accurate[] instruct[ion to] the jury on the law of this state." *Id.* at 800-01.

Mr. Bolin's petition for rehearing was denied on August 27, 1998. Certiorari was denied on March 1, 1999.

B. The Supreme Court of Nevada Recognizes That Mr. Bolin's Direct Appeal Was Erroneously Decided.

Four years after affirming Mr. Bolin's conviction and sentence, the Supreme Court of Nevada explicitly recognized that the instruction in Mr. Bolin's case—permitting the jury to consider the prior bad act evidence as establishing "propensity"—was erroneous.

In *Braunstein v. State*, 40 P.3d 413 (Nev. 2002), the Nevada Supreme Court expressly overruled the authorities on which it had relied to affirm Mr. Bolin's conviction. The Court held that "using uncharged acts to show criminal propensity is forbidden and is commonly viewed as grounds for reversal." *Id.* at 417. Such evidence, the Court explained, invites the jury to convict on the ground that it "believes the defendant to be a bad person." *Id.* Addressing its previous cases to the contrary, the Court "specifically overrule[d] the legal proposition . . . that evidence of other acts offered to prove a specific emotional propensity for sexual aberration is admissible and that, when offered, it outweighs prejudice." *Id.* at 418.

In *Richmond v. State*, 59 P.3d 1249 (Nev. 2002), the Nevada Supreme Court explicitly acknowledged that its decision in *Bolin* upholding the propensity instruction was erroneous:

> [T]he district court [in *Richmond*] instructed the jury that it could consider evidence of Richmond's prior bad acts to find he possessed a specific propensity for sexual aberration. This instruction derives directly from an instruction we upheld in *Bolin v. State*. Our decision in *Bolin* relied entirely on . . . the cases we overruled in *Braunstein*. Because we held in *Braunstein* that "evidence of other acts offered to prove a specific emotional propensity for sexual aberration is inadmissible," we direct the district courts to cease instructing juries that such evidence is admissible.

Richmond, 59 P.3d at 1256.

C. Mr. Bolin's State Petition For Postconviction Relief Is Denied on the Ground that the Instruction Was "Harmless."

Mr. Bolin's petition for state postconviction relief was timely filed on April 22, 1999 and argued before the trial court on September 29, 2004. Mr. Bolin argued, *inter alia*, that the admission of the evidence of the prior offense, coupled with the specific instructions to consider the evidence for "propensity" purposes, violated Nevada state law as established by *Braunstein* and *Richmond* and the due process and jury trial rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. *See Garceau v. Woodford*, 275 F.3d 769 (2001), *rev'd on other grounds by Woodford v.*

Garceau, 538 U.S. 202 (2003); *McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993).

The State conceded that, under *Braunstein* and *Richmond*, the admission of the prior bad acts evidence to show a propensity for sexual aberration and the corresponding jury instruction had been in error. The trial court denied the petition, holding that Mr. Bolin was not entitled to the benefit of the Nevada Supreme Court's subsequent recognition of its error in his case. The Nevada Supreme Court affirmed on different grounds, holding that although "*Richmond* would have rendered the sexual aberration jury instruction improper . . . the error in giving the instruction would have been *harmless* in light of the *weight of the evidence* supporting Bolin's conviction." Appendix, 3a.(emphasis added).

REASONS FOR GRANTING THE PETITION

This Court should grant this petition to correct a fundamental error routinely committed by the highest state courts and the federal courts of appeal. Every federal court of appeal to consider the issue has held that the consideration of prior bad acts evidence as propensity evidence violates due process. *See Alberni v. McDaniel*, 458 F.3d 860, 865-66 (9th Cir. 2006) (collecting cases). But, just as uniformly, the federal courts of appeal[9] and state appellate

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[9] *See e.g., Lacy v. Gardino*, 791 F.2d 980, 987 (1st Cir. 1986) (jury exposure to extra-record evidence of the defendant's prior bad acts, although admittedly a constitutional violation, was subject to a harmless error analysis on federal habeas review); *Dunnigan v. Keane*, 137 F.3d 117, 127 (2d Cir. 1998) (admission of evidence of past crimes without a limiting instruction subject to harmless error analysis on federal habeas review); *Albrecht v. Horn*, 485 F.3d 103, 127-29 (3rd Cir. 2007) (admission of prior crimes evidence without a limiting instruction combined with

courts[10] have subjected constitutional errors based on prior bad act evidence to a harmless error analysis. Harmless error review of the express invitation to base a conviction on propensity evidence has never been approved of by this Court and is contrary to this Court's precedents in *Sullivan v. Louisiana*, 508 U.S. 275, 281-282 (1993) and *Neder v. United States*, 527 U.S. 1, 11-13 (1999). Without this Court's guidance,

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explicit statements by the prosecutor to draw conclusions about the defendant's bad character and propensity to commit the current crime was subject to harmless error analysis); *Dorsey v. Quarterman*, 494 F.3d 527, 531-32 (5th Cir. 2007) (extrinsic evidence of prior crimes subject to harmless error analysis on federal habeas review); *Dudley v. Duckworth*, 854 F.2d 967, 972 (7th Cir. 1998) (subjecting other bad act evidence admitted without limiting instruction to harmless error analysis); *Hobbs v. Lockhart*, 791 F.2d 125, 128 (8th Cir.1986) (subjecting other crimes evidence to a harmless error analysis on federal habeas review); *McKinney v. Rees*, 993 F.2d 1378, 1385-86 (9th Cir. 1993) (deciding whether erroneously admitted character evidence was harmless error on federal habeas review); *Duvall v. Reynolds*, 139 F.3d 768, 788 (10th Cir. 1998) (articulating the rule that the constitutionally erroneous admission of prior acts testimony was subject to a harmless error analysis on federal habeas review); *Dobbs v. Kemp*, 790 F.2d 1499, 1504 (11th Cir. 1986) (on federal habeas review, finding that admission of evidence of prior crimes did not render trial fundamentally unfair because even if the jury considered it improperly, it was harmless).

[10] *See, e.g., State v. Goodson*, 135 P.3d 1116, 1126-27 (Kan. 2006) (assuming admission of propensity evidence implicates due process and applying harmless error review); *State v. Griffin*, 753 N.E.2d 967, 978 (Ohio App. 2001) (same); *State v. Barcella*, 16 P.3d 288, 295-96 (Idaho App. 2000) (noting that "due process does not guarantee . . . an error-free trial" and applying harmless error analysis to admission of evidence of prior bad acts); *cf. State v. Wareham*, 772 P.2d 960, 963 (Utah 1989) (holding that admission of prior bad acts evidence was error under applicable statute but finding error harmless).

this error will be repeated and will continue to undermine the fairness of criminal trials throughout the country.

This Court should also grant the petition because the erroneous application of a harmless error standard to the improper use of propensity evidence is largely insulated from federal habeas corpus review. In cases controlled by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), a federal court may not grant habeas relief unless a state court's adjudication "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). In *Estelle v. McGuire*, 502 U.S. 62 (1991), this Court recognized but reserved the question of whether it would "violate the Due Process Clause [to] permit[] the use of 'prior crimes' evidence to show propensity to commit a charged crime." *Id.* at 75 n.5. With that question and the appropriate standard of review left unanswered by this Court, petitioners are deprived of federal habeas review of this long recognized error and deprived of their rights to due process and a jury conviction beyond reasonable doubt. *See Alberni*, 458 F.3d at 865-66; *Bugh v. Mitchell*, 329 F.3d 496, 512-13 (6th Cir. 2003).[11]

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[11] Lower federal courts routinely deny habeas relief on this basis. *See, e.g., Paige v. Bradshaw*, No. 1:05-CV-2618, 2007 WL 1656242 (N.D. Ohio June 6, 2007), at *11-12 (denying habeas relief in case involving decades old allegations of uncharged misconduct because "the Supreme Court [in *Estelle*] left the issue open"); *Baker v. Lewis*, No. Civ. S-01-0804 LKK JFMP, 2007 WL 1040969 (E.D. Cal. Apr. 4, 2007), at *28 (denying petition for habeas relief on additional ground that "Supreme Court has not expressly held that it violates due process to admit other crimes evidence for the purpose of showing conduct in conformity therewith, or that it violates due process to admit

Mr. Bolin's case provides a vivid example of this error and the impact on the jury's findings. Here, the State sought to fill the holes in its wholly circumstantial case with graphic, explicit testimony from the victims of a wholly unrelated crime, committed more than twenty years earlier. Not only was the jury given no limiting instruction narrowing the use of such evidence to proper purposes, the jury was expressly told that it *could* consider the evidence for improper purposes, as proving that Mr. Bolin had an "emotional propensity" to commit sexual offenses and therefore was likely to have committed an unrelated assault and murder. In post-conviction proccedings, both the State and the Nevada Supreme Court conceded that the propensity instruction was erroneous.

But, without any analysis of the impact of the error—without any effort to identify supporting evidence free of taint—the Nevada Supreme Court baldly asserted that an improper propensity instruction was "harmless" in light of the "weight" of the (circumstantial) evidence. The conclusion is nothing but speculation and cannot be squared with this Court's decisions in *Sullivan* and *Neder*.

Yet, if AEDPA is deemed to apply to Mr. Bolin's case, the federal court will not be able to grant habeas relief under § 2254(d)(1) , because this Court has reserved judgment on this issue. This Court

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other crimes evidence for other purposes without an instruction limiting the jury's consideration of the evidence to such purposes"); *Casey v. Brown*, No. C:04-4749 RJH (Pr), 2007 WL 2209325 (N.D. Cal. July 30, 2007), at *10 ("Because . . . there is no clearly-established Supreme Court authority, habeas relief could not be granted even if the court were to hold that petitioner's due process rights were violated.")

should grant Mr. Bolin's petition to make the constitutional violation clear and to correct the erroneous application of harmless error review, in light of *Sullivan* and *Neder*.

I. THIS COURT SHOULD MAKE CLEAR THAT AN EXPLICIT INVITATION IN A CIRCUMSTANTIAL CASE TO CONSIDER PRIOR ACTS EVIDENCE AS EVIDENCE OF A "PROPENSITY" TO COMMIT THE CHARGED OFFENSE IS CONSTITUTIONAL ERROR THAT CANNOT BE HARMLESS.

A. The Lower Court's Treatment of Such an Error as Harmless Cannot Be Squared with This Court's Jurisprudence.

The right to be found guilty *of the crime charged* beyond a reasonable doubt is integral to our system of criminal justice, and encompassed in the 5th and 14th Amendments' guarantees of due process. *In re Winship*, 397 U.S. 358, 360-61 (1970). This Court has long recognized that constitutional errors that impinge on that right can not be deemed harmless, relying on both the due process guarantee and the Sixth Amendment right to a jury trial. *Sullivan*, 508 U.S. at 281-282. The error at issue here—an express invitation to consider prior bad acts evidence as evidence of a propensity to commit the charged crime—is an intrinsic error, which taints the entirety of the jury's deliberations and findings.

In *Sullivan*, this Court explained that a constitutionally defective reasonable doubt instruction cannot be harmless, because the error "vitiates *all* the jury's findings." *Id.* at 281 (emphasis in original). There are no untainted findings against

which the taint might be measured and found harmless. In such circumstances, a "reviewing court can only engage in pure speculation—its view of what a reasonable jury would have done." *Id.* The effect of the error itself is "unquantifiable," and thus not subjected to harmless error analysis. *Id.* at 282.

Especially in a wholly circumstantial case, the use of "prior bad acts" evidence to establish "propensity" also undermines the entirety of the jury's findings of guilt. As this Court has recognized, propensity evidence tends to "weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Michelson v. United States*, 335 U.S. 469, 476 (1948). The express invitation to consider inflammatory prior bad act evidence as establishing a criminal propensity gives the jury explicit authorization to resolve doubts about the inferences to be drawn from circumstantial evidence, eroding the presumption of innocence and the requirement of a finding of guilt beyond reasonable doubt. *See also Spencer v. Texas*, 385 U.S. 554, 575 (1967) (Warren, C.J., concurring in part and dissenting in part) ("Evidence of prior convictions has been forbidden because it jeopardizes the presumption of innocence of the crime currently charged."). Like a defective reasonable doubt instruction, this is a "structural defect[] in the constitution of the trial mechanism, which def[ies] analysis by 'harmless-error' standards." *Sullivan*, 508 U.S. at 281 (internal quotations omitted).

As with an erroneous burden of proof instruction, the invitation to the jury to view the evidence in light of the defendant's supposed "propensity" pervades the trial as a whole, vitiating all the jury's findings concerning the defendant's state of mind and conduct.

Once a jury is presented with evidence of prior bad acts and invited to consider it as establishing a propensity, the jury can bring that propensity to bear in deciding the inferences from, and the weight, relevance, and credibility of, every bit of circumstantial evidence. Because the error affects *all* the evidence, an instruction authorizing the jury to view circumstantial evidence through the lens of "propensity" cannot be "quantitatively assessed in the context of other evidence." *Sullivan*, 508 U.S. at 281. A reviewing court can only "speculat[e]" as to what a jury might have decided absent the erroneous instruction. *Id.*[12]

Moreover, as *Sullivan* explains, the application of "harmless-error" review in such a case would violate the defendant's Sixth Amendment right to a trial by jury. *See Sullivan*, 508 U.S. at 281. Faced with a pervasive constitutional error, a reviewing court may not substitute its judgment for what it concludes a hypothetical jury would have done absent the error. As this Court has explained, when a reviewing court performs that analysis, "the wrong entity judge[s] the defendant guilty." *Rose v. Clark*, 478 U.S. 570, 578 (1986). The reviewing court's hypothetical verdict is substituted for a properly-instructed jury's actual

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[12] *See also* D. Craig Lewis, *Proof and Prejudice: A Constitutional Challenge to the Treatment of Prejudicial Evidence in Federal Criminal Cases*, 64 WASH. L. REV. 289, 326, n.140 (1989) (Empirical data show, "if the jury learns of uncharged misconduct by the defendant it will probably use a different . . . calculus of probabilities in determining guilt") (internal quotation omitted); James S. Liebman, *Proposed Evidence Rule 413 to 415 - Some Problems and Recommendations*, 20 U. DAYTON L. REV. 753, 754-55 (1995) ("Propensity evidence often is credited by jurors with more weight than it deserves.").

verdict. The Sixth Amendment will not tolerate that substitution; an actual untainted jury must consider the evidence and render a verdict.

In *Neder v. United States*, this Court established the framework for determining whether a jury-instruction error is an ordinary trial error that can be deemed harmless. *Neder v. United States*, 527 U.S. 1, 11-13 (1999). *Neder* expressly upheld the logic of *Sullivan* as to pervasive errors, but explained that *Sullivan* does not control when the error relates only to the misinstruction or omission with regard to a single element of the offense. *Id.* In such a case, the evidence presented as a whole may be considered, and the harmlessness of the omitted element may be evaluated and quantified. *Id.*

Unlike the omission of an element, the impact of authorizing the jury to convict based on "propensity" in a circumstantial case is not limited to a single element of the offense. A propensity instruction infects the entire trial—the manner in which the jury views *all* the evidence—and yields "consequences that are necessarily unquantifiable and indeterminate." *Sullivan*, 508 U.S. at 282.

Mr. Bolin's case squarely presents this issue. Error is conceded: The jury was improperly instructed to consider the prior bad act as evidence of "propensity" to commit the crime charged. This error deprived Mr. Bolin of a fair trial on the State's circumstantial case. Assessing how the jury would have responded to the circumstantial evidence in the absence of such an error is an exercise in speculation. Because of the pervasive, unquantifiable effect the explicit instruction to consider bad acts evidence as evidence of propensity, the error was not and could not be harmless. *See id.*

B. In Announcing the Correct Standard of Review, This Court Should Confront a Question Left Open in *Estelle* and Hold that an Express Invitation to Consider Evidence for Propensity to Commit the Crime Charged Can Violate Due Process.

In *Estelle*, the jury had *not* been invited to consider the challenged evidence as propensity evidence. In a footnote, this Court declined to reach the question "whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime." *Id.* at 75 n.5.

Throughout this Court's jurisprudence, this Court has sanctioned the admission of evidence of prior bad acts only where there are adequate safeguards in place to ensure that a defendant's constitutional rights are protected. In *Spencer v. Texas*, 385 U.S. 554 (1967), for example, this Court relied on limiting instructions to ensure that prior bad acts were not considered as propensity evidence thus compromising the presumption of innocence and the reasonable doubt standard. There, the Court addressed the constitutionality of a habitual offender statute that required the allegation of previous convictions for similar offenses in the indictment, and the introduction of evidence of the offenses at trial for sentencing purposes. *Id.* at 556 n.1. The Court found that the risk of prejudice was balanced by clear instructions to juries to consider the evidence only for the limited purpose—sentence enhancement—for which it was admissible: "[T]he jury trying the pending criminal charge was fully informed of [a defendant's] previous derelictions, but was also charged by the court that such matters were not to be

taken into account in assessing the defendant's guilt under the current indictment." *Id.* at 556; *see also id.* at 562 ("[T]he law of evidence . . . has evolved a set of rules designed to reconcile the possibility that this type of information will have some prejudicial effect with the admitted usefulness it has as a factor to be considered by the jury . . . ."); *see also Dowling v. United States*, 493 U.S. 342, 353 (1990) (emphasizing importance of limiting instructions in finding no constitutional error in admission of acquittal of prior crime).[13]

In *Estelle*, this Court analyzed the admission of evidence that a defendant had previously abused a child he was accused of murdering. *Id.* at 67. At trial, the court gave a limiting instruction that forbade the use of the evidence to show that the defendant "has a disposition to commit crimes." *Id.* at 67 n.1. Instead, the instruction continued, the evidence could only be considered for limited purposes. The court instructed the jury that it could determine whether "it may [be] logically concluded that if the Defendant committed other offenses, he also committed the crime charged." The Defendant argued that this instruction amounted to a propensity instruction. *Id.* at 71.

The Court disagreed, because the challenged language had been cabined by an appropriate limiting instruction: "While the instruction was not as clear as it might have been, we find that there is

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[13] In his concurring and dissenting opinion, Chief Justice Warren noted the power of prior bad act evidence, and the tendency to alter the presumption of innocence. *Id.* at 575 (Warren, C.J., concurring in part and dissenting in part); *see also id.* at 575 nn. 4-6 (surveying commentary and caselaw).

not a 'reasonable likelihood' that the jury would have concluded that this instruction, read in the context of other instructions, authorized the use of *propensity evidence* pure and simple." *Id.* at 74-75 (emphasis added). Because the instruction did not amount to a "propensity instruction," the Court held that "neither the introduction of the challenged evidence, nor the jury instruction as to its use, 'so infused the trial with unfairness as to deny due process of law.'" *Id.* at 75 (internal citations omitted).

Spencer and *Estelle* rely heavily on limiting instructions to ensure that prior bad acts are not considered merely for propensity. The failure to give a limiting instruction permits the prior bad acts to be considered for propensity and thus violates due process. *See Murray v. Superintendent, Kentucky State Penitentiary*, 651 F.2d 451, 453 (6th Cir. 1981) ("The logical converse of [*Spencer*] is that it is unfair and violative of due process if evidence of other crimes is admitted without a limiting instruction.") When there is no limiting instruction *and* the jury is expressly invited to consider the evidence for propensity to commit the crime charged, the violation of due process is severe.

In the years since *Estelle* reserved judgment on the issue, every federal court of appeals to consider the issue has recognized that the improper use of propensity evidence may compromise the fundamental fairness of a criminal trial. *See Alberni*, 458 F.3d at 865-66 (collecting cases and stating that "every circuit . . . has acknowledged, at least implicitly, that the improper introduction of evidence may violate due process if it renders a trial fundamentally unfair."); *see also Dunnigan v. Keane*, 137 F.3d 117, 127 (2d Cir. 1998) (failure to give a limiting instruction could "constitute an error so

egregious as to amount to a denial of due process"); *Albrecht v. Horn*, 485 F.3d 103, 128-129 (3d Cir. 2007) (admission of propensity evidence without a limiting instruction could violate due process if sufficiently "inflammatory"); *McKinney*, 993 F.2d at 1385 (admission of irrelevant propensity evidence violated due process clause); *Duvall v. Reynolds*, 139 F.3d 768, 788 (10th Cir. 1998) (acknowledging that mistakenly admitted evidence of prior crimes or convictions can "imping[e] on fundamental fairness of the trial itself.")(internal quotations omitted).

Where such evidence is admitted, the federal courts of appeal have required careful limiting instructions to prevent the use of such evidence for propensity. *See e.g. Albrecht*, 485 F.3d at 128 ("[I]t [is] extremely important that the jury understand the limited purpose in every case of such evidence.")(internal quotations and citations omitted).[14] Where such

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[14] Federal Rules of Evidence 413 and 414, which purport to allow the admission of evidence of prior sexual offenses in any sex offense case, were consistently and vigorously opposed by the Judicial Conference and Advisory Committee. *See* Judicial Conference's Statement to Congress Regarding Proposed Rules 413, 414 (noting the strong opposition by the "overwhelming majority of judges, lawyers, law professors, and legal organizations" who commented on the Proposed Rule, and that the Advisory Committee on Evidence recommended against the adoption of the rules with only one dissenting vote from the Department of Justice.) The lower courts have tried to limit the impact of Rules 413 and 414 by balancing of the prejudicial and probative value of such evidence under rule 403. *See e.g. United States v. Lemay*, 260 F.3d 1018, 1027 (9th Cir. 2001) ("We . . . conclude that as long as the protections of Rule 403 remain in place so that district judges retain the authority to exclude potentially devastating evidence, Rule 414 is constitutional."). The impact and constitutionality of Rules 413 and 414 remain unresolved.

safeguards are absent, the courts of appeal have consistently held that constitutional error results. *See id.; Garceau*, 275 F.3d at 776; *Murray*, 651 F.2d at 453.

This Court should make clear for all purposes what the courts of appeal have resolved. For without clarification from this Court, state courts remain free to misapply federal Due Process requirements immune from federal habeas review. Under AEDPA, federal courts may grant relief only if the state court adjudication violates "clearly established Federal law as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Because this Court has expressly left the question open, the lower courts have held that federal courts are precluded from affording relief for this error in cases controlled by AEDPA. *See Alberni*, 458 F.3d at 867; *Paige*, 2007 WL 1656242 at *11-12.

This result is not what Congress intended in enacting the "clearly established federal law" requirement. Congress meant to curtail the imposition on the states of disputed and unsettled federal constitutional rights.

Mr. Bolin's case is an appropriate vehicle for resolving the issue. This case presents precisely the scenario that this Court identified as a potential problem in *Estelle*, but declined to address: whether an express invitation to consider propensity evidence as such violates due process. In Mr. Bolin's case, the safeguards on which the Court relied in *Estelle* and *Spencer* are entirely absent. Instead, the jury was given an express invitation to consider the evidence as establishing propensity. This Court should grant review in Mr. Bolin's case both to settle the standard of review for such an error and, with the intervening

experience of the lower federal courts, to make clear what *Estelle* left open: that such an instruction violates the defendant's right to due process.

II. WHILE THE LOWER COURTS CONSISTENTLY APPLY THE HARMLESS ERROR STANDARD TO PRIOR BAD ACT ERRORS, THEIR ANALYSES OFTEN UNDERSCORE THE STRUCTURAL NATURE OF THE ERROR.

As noted above, the courts of appeal have forbidden evidence of other bad acts except pursuant to limiting instructions. Where, however, such safeguards are absent, and the jury was permitted to view such evidence as establishing a propensity to commit the crime charged, the courts consistently purport to weigh the evidence to determine whether the error was harmless. *See McKinney*, 993 F.3d at 1385-86 (finding pervasive propensity error but weighing evidence to assess the error's effect); *Garceau*, 275 F.3d at 777 (same); *Albrecht*, 485 F.3d at 129 (same); *see also* n. 9, *supra* (collecting cases applying harmless error analysis to propensity errors). Review of those cases shows that harmless error review is inappropriate in a circumstantial case; such an error is pervasive and cannot be harmless under *Sullivan* and *Neder*.

For example, in *McKinney*, the Ninth Circuit first "address[ed] the question left unanswered in *Estelle:* When does the use of character evidence to show propensity constitute a violation of the Due Process Clause?" 993 F.2d at 1384. The Court held that it violated the Due Process clause to admit evidence of other bad acts that supported no permissible inferences, such as motive, intent, or identity. The court then assessed the error under a harmless-error

standard. The court of appeal's own analysis shows that the harmlessness inquiry is misplaced.

The defendant in *McKinney* was accused of murdering his mother, who had died from knife wounds. At trial, the State introduced considerable evidence that the defendant possessed, collected, and was, in fact, "fascinat[ed] with knives," and he had once carved the words, "Death is His" into his closet door with a knife. 993 F.2d at 1382-83.

The court held that the failure to provide a limiting instruction for such evidence permitted it to be used as "character evidence" and was thus "contrary to firmly established principles of Anglo-American jurisprudence." *Id.* at 1380; *see also id.* at 1381 and n.2 ("The rule against using character evidence to show behavior in conformance therewith, or propensity . . . has persisted since at least 1684 to the present . . . ."). The purpose of the rule against character evidence was

> to force the jury, as much as humanly possible, to put aside emotions and prejudices raised by phrases such as "fascination with knives" and "Death is His," and consider the body of evidence, both testimonial and physical, before them, in order to decide if the prosecution has convinced them, beyond a reasonable doubt, that the defendant is guilty of the crime charged.

Id. at 1384.

The "emotionally charged" other acts evidence in *McKinney*, the court concluded, served to show propensity: "[M]uch of the disputed evidence was 'other acts' evidence probative only of character. *Id.* That evidence was "pervasive[] . . . throughout the

trial." *McKinney*, 993 F.2d at 1386. Over 60 pages of testimony was devoted to "McKinney's knife ownership and camouflage pants." *Id.* Essentially, "[t]he jury was offered the image of a man with a knife collection, who sat in his dormitory room sharpening knives, scratching morbid inscriptions on the wall, and occasionally venturing forth in camouflage with a knife strapped to his body." *Id.*

By contrast, the "case against [the defendant] based on relevant evidence was solely circumstantial." *Id.* The trial was therefore "impermissibly tainted" by the propensity evidence, because it allowed the jury to "skip[] careful analysis of the logical inferences raised by the circumstantial evidence and convict[] McKinney on the basis of his suspicious character and previous acts . . . ." *Id.* at 1385.

This assessment of the impact of propensity evidence is exactly right, but it renders harmless error analysis inappropriate. Where the jury's consideration of all the inferences in a circumstantial case are tainted by propensity evidence, the error has "consequences that are necessarily unquantifiable and indeterminate." *Sullivan*, 508 U.S. at 282. In such a case, the error "vitiates *all* the jury's findings." *Sullivan*, 508 U.S. at 281. The attempt in such a case to "weigh" the evidence – where the inferences drawn by the jury from that evidence were tainted by error – results in a determination of guilt by the wrong fact finder.

III. THE NEVADA SUPREME COURT'S ANALYSIS CREATES A CONFLICT WITH THE FEDERAL CASES.

The error in Mr. Bolin's case could not be harmless and cannot be considered "harmless" under any standard, including that employed by *McKinney* and

the other cases to consider the improper use of "other bad acts" evidence. As in *McKinney*, the propensity evidence – the direct testimony of a rape victim and her companion – was "emotionally charged." *See McKinney*, 993 F.2d at 1385; *c.f.*, *Spencer*, 385 U.S. at 562 (evidence of prior convictions was "almost always[] of a documentary kind," and there was "no claim that its presentation was in any way inflammatory"). The victims testified in graphic detail about the previous offense and its long-term aftermath. As in *McKinney*, the case against Mr. Bolin was wholly circumstantial, requiring the jury to draw inferences from a variety of wholly indirect facts.

Worse, not only was no limiting instruction given, but the jury was given an unambiguous, erroneous propensity instruction. *Garceau v. Woodford*, 275 F.3d 769, 776 (2001), (when potential propensity evidence is introduced, "[t]he only way to mitigate this harm, short of excluding the evidence altogether . . . is to give the jury a limiting instruction. Even worse than failing to give such an instruction is what the trial court did in this case: affirmatively inviting the jury to draw the propensity inference"), *rev'd on other grounds by Woodford v. Garceau*, 538 U.S. 202 (2003).[15] It is not possible to say, in such a case, that

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[15] *Garceau* was presented to the Court of Appeals pursuant to a petition for habeas corpus under 28 U.S.C. § 2254, prior to the passage of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). The court of appeals held that the AEDPA was not applicable because the petition was already pending when AEDPA was enacted. The Supreme Court reversed and remanded on this point. *Woodford v. Garceau*, 538 U.S. 202, 210 (2003). The petitioner, however, died before the case was reconsidered. *Garceau v. Woodford*, 399 F.3d 1101, 1101 (9th Cir. 2005).

it was "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967).

By instructing the jury to consider the evidence of Mr. Bolin's previous offense for propensity purposes, the trial court failed to guard against the fundamentally unfair possibility that, in this wholly circumstantial case, "[a] jury might punish an accused for being guilty of a previous offense, or feel that incarceration is justified because the accused is a 'bad man' without regard to his guilt of the crime currently charged." *Spencer*, 385 U.S. at 575 (Warren, C.J., concurring in part and dissenting in part). Faced with the State's concession of error—an error with pervasive and unquantifiable impact on the trial—the Nevada Supreme Court's terse harmlessness review was inappropriate and indefensible.

If AEDPA were deemed to apply to this claim,[16] habeas review by the federal courts likely would be foreclosed for Mr. Bolin for all time, because this Court has not yet decided the issue. *See Alberni*, 458 F.3d 860, 866-67; 28 U.S.C. § 2254(d)(1). This Court should grant review to address the standard of review and to secure uniform treatment of the issue on direct and federal habeas review.

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[16] Mr. Bolin does not concede that application of AEDPA is appropriate in any future federal habeas case, but anticipates such an argument by the State.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

MICHAEL R. DOYEN*
PAUL J. WATFORD
MELINDA E. LEMOINE
LEE S. TAYLOR
JULIE D. CANTOR
Munger, Tolles & Olson LLP
355 South Grand Avenue
Suite 3500
Los Angeles, CA 90071
(213) 683-9100

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* *Counsel of Record*